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No. 81-2083

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ITT CONTINENTAL BAKING COMPANY, INC., et al.,
Petitioners,

vs.

WILLIAM INGLIS & SONS BAKING CO., et al.,
Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 11, 1982

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QUESTIONS PRESENTED

1. If no legal error is committed in the presentation of evidence and instructions to a jury during a four-week trial, do the Constitution or principles of sound judicial administration preclude a trial judge from awarding a redundant new trial wherein the same evidence and the same instructions will be presented to a second jury merely because the trial judge believes the first jury's verdict was against the weight of the evidence?

2. Pursuant to its supervisory responsibilities over the federal judiciary, should this Court occasionally review a trial record to ensure the Constitutional right to a jury trial is not being negated by district judges who disagree with jury verdicts.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Sunlite Baking Company, Inc., a subsidiary of William Inglis & Sons Baking Co., is a party to this proceeding.

TABLE OF CONTENTS

	Page
Questions presented	i
Parties to the proceedings	i
Jurisdiction	1
Opinions below	2
Constitutional and statutory provisions involved in this cross-petition	2
Counter-statement of the case	4
A. State law claim	6
B. Federal law claims	9
Reasons for granting the writ	11
1. There is a split among the Circuit Courts of Appeal regarding the proper standard of review to be applied under the Seventh Amendment to Motions for a New Trial on the ground the verdict was against the weight of the evidence	11
2. The Court of Appeals decision affirming the grant of Continental's Motion for New Trial clashes with principles of efficient judicial administration	15
3. This Court must occasionally review a trial record to ensure the lower courts do not erase the right to trial by jury	17
Conclusion	19

TABLE OF AUTHORITIES CITED

Cases

Page

Angle v. Sky Chief, Inc., 535 F.2d 492 (9th Cir. 1976) 16

Anglo-American General v. Jackson National Life Ins. Co., 83 F.R.D. 41 (N.D. Cal. 1979) 12

Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355 (1962) 12, 16

Autohaus Brugger, Inc. Saab Motors, Inc., 567 F.2d 901 (9th Cir. 1978) 17

Basham v. Pennsylvania Railroad Co., 372 U.S. 699 (1963) 12

Bazile v. Bissa Marine Co., 606 F.2d 101 (5th Cir. 1979) 14

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 15, 16

Borgue v. Diamond M Drilling Co., 623 F.2d 351 (5th Cir. 1980) 16

Borras v. Sea-Land Service, Inc., 586 F.2d 881 (1st Cir. 1978) 13

California Computer Products v. International Business Machines, 613 F.2d 727 (9th Cir. 1979) 17

Continental Airlines, Inc. v. Wagner-Moorehouse, Inc., 401 F.2d 23 (7th Cir. 1968) 14

Daiflon, Inc. v. Bohanon, 612 F.2d 1249 (10th Cir. 1979), rev'd on other grounds, 449 U.S. 33 (1980) 14

Duncan v. Duncan, 337 F.2d 49 (6th Cir. 1967), cert. der., 389 U.S. 913 ..... 14, 16

England v. Chrysler Corp., 493 F.2d 269 (9th Cir. 1974) 17

Table of Authorities Cited

Cases

Page

Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc., 466 F.2d 179 (8th Cir. 1972), cert. denied, 410 U.S. 930 ..... 14, 15, 16

Fount-Wip, Inc. v. Redi-Whip, Inc., 568 F.2d 1296 (9th Cir. 1978) 12, 17

Gaspard v. Taylor Diving & Salvage Co., 649 F.2d 372 (5th Cir. 1981) 16

Greyhound Computer v. International Bus. Mach., 559 F.2d 488 (9th Cir. 1977) 17

Guidry v. Kevy, 598 F.2d 402 (5th Cir. 1979) 16

Hallmark Industry v. Reynolds Metal Co., 489 F.2d 8 (9th Cir. 1973) 17

Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976) 17

Hilton v. Mumaw, 522 F.2d 588 (9th Cir. 1975) 17

In re U.S. Financial Securities Litigation, 609 F.2d 411 (9th Cir. 1979) 12, 18

Kaplan v. Burroughs Corp., 426 F.Supp. 1328 (N.D. Cal. 1977) 17

Kaplan v. Burroughs Corp., 611 F.2d 286 (9th Cir. 1979) 17

Lincoln Carpet Mills v. Singer Co., 549 F.2d 80 (8th Cir. 1977) 14

Lind v. Schenley Industries, Inc., 278 F.2d 79 (3d Cir. 1960), cert. den., 364 U.S. 835 (1961) 13, 14, 16

Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978) 17

Minthorne v. Seeburg Corp., 397 F.2d 237 (9th Cir. 1968) 12

Table of Authorities Cited

Cases

Page

Moore v. Schultz, 491 F.2d 294 (10th Cir. 1974) 16

Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981) 17

Naify v. McClatchy Newspapers, 1977-2 Trade Cases ¶ 61,558 (N.D. Cal. 1977) 17

Narcisse v. Ill. Central Gulf R. Co., 620 F.2d 544 (5th Cir. 1980) 16, 18

Noble v. McClatchy Newspapers, 533 F.2d 1081 (9th Cir. 1975) 17

O'Neil v. W.R. Grace & Co., 410 F.2d 908 (5th Cir. 1969) 13, 14, 15, 16

People v. Gordon, 105 Cal.App.2d 711 (1951) 7

Rios v. Empress Lines Maritimas Argentinas, 575 F.2d 986 (1st Cir. 1978) 14

Ryan v. Foster & Marshall, Inc., 556 F.2d 460 (9th Cir. 1977) 17

Santa Clara Valley Distributing v. Pabst Brewing Co., 556 F.2d 942 (9th Cir. 1977) 17

Spurlin v. General Motors Corp., 528 F.2d 612 (5th Cir. 1976) 16

Syufy Enterprises v. Nat'l General Theatres, Inc., 1978-1 Trade Cases ¶ 61,996 (9th Cir. 1978) 17

Taylor v. Washington Terminal Co., 409 F.2d 145 (D.C. Cir. 1969), cert. den., 396 U.S. 835 13

Tennant v. Peoria & Pekin Union Railway Co., 321 U.S. 29 (1943) 11

Table of Authorities Cited

Cases

Page

Tomac, Inc. v. Coca Cola Co., 418 F.Supp. 359 (C.D. Cal. 1976) 17

Vander Zee v. Karabatsos, 589 F.2d 723 (D.C. Cir. 1978), cert. den., 441 U.S. 910 ..... 13, 16

Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co., 389 F.Supp. 1334 (N.D. Cal. 1975), rev'd 526 F.2d 86 (9th Cir. 1975) 6, 12

United States Constitution

Seventh Amendment 2, 11, 16

Statutes

California Business and Professions Code:

§ 17026 ..... 2, 6
§ 17029 ..... 3, 16
§ 17043 ..... 6, 7
§ 17050(d) 7
§ 17071 ..... 3, 7

California Unfair Practices Act, Section 17043 2

Robinson-Patman Act, Section 2(a) (15 U.S.C. Section 3(a)) 3, 8, 9, 10, 19

Sherman Act, Section 2 (15 U.S.C. Section 2) 3, 8, 9, 10, 19

28 U.S.C. Section 1254(1) 1

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VS.

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Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cross-petitioner William Inglis & Sons Baking Company respectfully prays that a Writ of Certiorari be issued to review the modified judgment of the Court of Appeals for the Ninth Circuit entered on February 10, 1982.

JURISDICTION

This is a cross-petition filed pursuant to Rule 19.5. Petitioner's petition was filed in this Court on May 11, 1982 and was received by cross-petitioner's counsel on May 14, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

OPINIONS BELOW

The modified opinion of the Court of Appeals reversing the District Court's judgment n.o.v., but affirming the order granting a new trial, is reported at 668 F.2d 1014. It is attached as Appendix A to petitioner's petition. The District Court opinion is reported at 461 F.Supp. 410 and is annexed as Appendix C to petitioner's petition. Citations to the lower courts' opinions in this cross-petition are to those appendices.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CROSS-PETITION

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury should be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The California Unfair Practices Act, in Section 17043 of the California Business and Professions Code, provides:

> It is unlawful for any person engaged in business within this state to sell any article or product at less than the cost thereof to such vendor, or give away any article or product for the purpose of injuring competitors or destroying competition.

Section 17026 of the California Business and Professions Code provides in pertinent part:

> "Costs" as applied to production includes the cost of raw materials, labor and all overhead expenses of the producer.

Section 17029 of the California Business and Professions Code provides:

> "Cost of doing business" or "overhead expense" means all costs of doing business incurred in the conduct of the business and shall include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest of borrowed capital, depreciation, selling costs, maintenance of equipment, delivery costs, credit losses, all type of licenses, taxes, insurance and advertising.

Section 17071 of the California Business and Professions Code provides:

> In all actions brought under this chapter proof of one or more actions of selling or giving way any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition.

Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Robinson-Patman Act, amending Section 2(a) of the Clayton Act (15 U.S.C. § 3(a)), provides in pertinent part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either di-

rectly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .

COUNTER-STATEMENT OF THE CASE

After seven years of discovery, this action was tried to a jury for four weeks. Plaintiff/cross-petitioner William Inglis & Sons Baking Company ("Inglis") had alleged in its amended complaint that defendant ITT Continental Baking Company ("Continental") had violated state and federal law by charging discriminatory and below cost prices for its one-pound loaf of "private label" white pan bread with the purpose and effect of driving small wholesale bakers such as Inglis out of business.

In Northern California and other "problem areas," Continental's sales of Wonder Bread (its higher-priced and more profitable advertised brand) were declining due to the widening spread in prices between advertised label and private label bread. (RT 176, 319, 505-6, 2013, P-244). Continental therefore directed its consulting firm, McKinsey & Company, to develop a plan to combat independent private label wholesale bakers such as Inglis. The initial McKinsey Report, issued September 7, 1971, included a

strategy euphemistically designed "to hasten wholesaler exit." (P-114) During subsequent meetings, Continental's officers instructed McKinsey to study the feasibility of Continental holding or decreasing its private label prices for four or five years, absorbing all cost increases and thereby driving smaller private label wholesalers from the market.[1] McKinsey was told to develop means of implementing such a pricing strategy. (RT 3823-5; 3908-11)

The final McKinsey Report, dated October 22, 1971, presented a definitive plan to "hold the price."[2] It stated that Continental "must compare itself to its competitors in terms of its current financial strength and either its capability for holding or reducing costs or its willingness to absorb future cost increases by accepting lower profits." The objective was plainly stated: "The outcome of this strategy would be an acceleration in the shake-out of marginal bakers . . ." (P-116, p. MK 187, App. E at 2) The report noted that in the past Continental had benefitted from the "attrition" of wholesale bakers; Continental could pick off troublesome competitors by initiating price reductions "on a market by market" basis and thereby realize the benefits of increased concentration.

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[1]One Continental official opined that if Continental were unable to substantially reduce expenses the *only* way to reduce the price spread between advertised and private label bread was for Continental to forego profits until its competitors went out of business (P-113, p. MK 717).

[2]Portions of the October McKinsey Report are attached hereto as Appendix E, so designated as not to cause confusion with the appendices A-D filed with Continental's petition.

There can be no question that Continental decided to adopt and implement this predatory pricing strategy in Northern California. Throughout the early 1970s, Continental sold its private label bread below cost and absorbed $5,200,000 in losses. (RT 211) Despite unprecedented escalating costs, Continental continually reduced its prices for private label bread. During Inglis' last year of business, Continental made a special effort to take Inglis' major accounts with below cost prices. (P-73, P-260A, P-238, P-242, P-243, RT-320) Eventually, after years of sustained below-cost sales, Continental succeeded in driving Inglis and other competitors from the market. Inglis went out of business altogether in 1976.[3] Only two full-service wholesale bakers were left in Northern California, Continental and Campbell-Taggart, Inc.

A. State Law Claim

Inglis' state law claim was based upon the California Unfair Practices Act.

California law prohibits the sale of goods below the average total cost of production for the purpose of "in-

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[3]On the hearing for preliminary injunction, the district court found that "competition is being smothered in this market" but, nonetheless, denied equitable relief. That order, reported at 389 F.Supp. 1334, 1347 (N.D. Cal. 1975), was reversed by the Ninth Circuit in *Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975), but too late to save Inglis' business from destruction. The district court conducted no further proceedings and issued no further order concerning the preliminary injunction motion following the reversal, Inglis' plant was closed by action of its creditors and the corporation became the subject of proceedings under the Bankruptcy Act.

juring competitors or destroying competition." Cal. Bus. & Prof. Code §§ 17043, 17026, 17029. Both the District Court and the Court of Appeals recognized that Inglis had demonstrated—indeed, that Continental had admitted (RT 61)—sales of white pan bread by Continental below its average total cost. App. at C7, 461 F.Supp. at 423; App. at A25, 668 F.2d at 1035. Proof of such below-cost sales, together with proof of their injurious effect upon Inglis, created a presumption that Continental intended to injure its competitors or destroy competition in violation of § 17043. Cal. Bus. & Prof. Code § 17071; App. at A55-6, 668 F.2d at 1049 n.61. This statutory presumption was buttressed by the substantial evidence of Continental's predatory intent described above. See pp. 4-6, *supra*.

As the Court of Appeals acknowledged, Inglis presented sufficient evidence to the jury to establish a *prima facie* violation of the California Unfair Practices Act by Continental. App. at A58, 668 F.2d at 1050 n.64. The burden was therefore upon Continental to establish an affirmative defense to avoid liability. *People v. Gordon*, 105 Cal.App.2d 711 (1951). Continental attempted to do so. Continental tried to convince the jury that its below-cost sales were "an endeavor made in good faith to meet the legal prices of [a] competitor selling the same article or product, in the same locality or trade area . . ." Cal. Bus. & Prof. Code § 17050(d). The jury received the parties' evidence and the Court's instructions on the "meeting competition" defense without objection from Continental. RT 5327-32. As the trier of fact, the jury rejected Continental's proffered excuse for its below-cost sales. Instead, the jury returned a

verdict for Inglis on its state law claim, as well as its claims under Sherman Act § 2 and Robinson-Patman Act § 2(a).[4]

Continental moved for an order granting judgment n.o.v. or, in the alternative, an order granting a new trial. With respect to Inglis' claim under the California Unfair Practices Act, the District Judge acknowledged the parties' evidence on the "meeting competition" issue differed sharply and denied the motion for judgment n.o.v. However, the District Judge granted Continental a new trial on the state law claim because, in his opinion, "the weight of the evidence establishes that the defendant maintained these below-cost prices in a good faith response to competition." App. C at C18-19, 461 F.Supp. at 423. In denying Continental's appeal that it should have been granted judgment n.o.v. on the Unfair Practices Act claim, the Ninth Circuit likewise held the "meeting competition" defense to Inglis' state law claim had to be resolved by a jury. App. A at 52, 668 F.2d at 1047-48. Nevertheless, the Court of Appeals denied Inglis' request for reinstatement of the jury verdict on the state law claim and remanded the case for a new trial. App. A at 57-8, 668 F.2d at 1050.

Although both lower courts agreed the validity of the parties' claims and defenses under the California Unfair Practices Act must be determined by a jury, neither court was willing to accept the jury's decision after it had heard

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[4] The state law claim does not involve the appropriate legal standard for assessing claims of predatory pricing under the federal antitrust laws. As the Court below held, the federal antitrust statutes have not pre-empted the law of California regarding unfair trade practices. App. at A53-57, 668 F.2d at 1048-50. Neither party is seeking a review of that holding by this Court.

all of the evidence and received appropriate instructions. Disagreeing with the unanimous opinion of six impartial jurors and disregarding the substantial evidence upon which the collective opinion was based, the District Court felt "the weight of the evidence" established that Continental's below-cost prices were a good faith response to competition and ordered a new trial. App. C18-19, 461 F.Supp. at 423. No other reason was or could be given for the grant of a new trial on Inglis' state law claim. The panel of the Court of Appeals also applied a "weight of the evidence" standard of review and, not wishing to interfere with the trial judge's exercise of his discretion, affirmed the new trial order. App. at A57-8, 668 F.2d at 1050. The parties are now preparing to re-try the case to a second jury.

B. Federal Law Claims

Sherman Act § 2 prohibits pricing which is predatory. The Robinson-Patman Act § 2(a) prohibits pricing which is discriminatory when such pricing may substantially lessen competition or tend toward monopoly. The jury found that Continental's prices were both predatory and discriminatory and rejected the defense that Continental's prices were a good faith response to competition.

The district court disagreed with the jury and granted Continental's motion for judgment n.o.v. on Inglis' federal claims or, in the alternative, a new trial. The Court of Appeals reversed the judgment n.o.v. and held that although a price "below average total costs and above average variable costs is not inherently predatory, it does not follow however, that such prices are never predatory"

under Sherman Act § 2. App. A at 27, 668 F.2d at 1035. The Court of Appeal further held that if Inglis could prove that the anticipated benefit of Continental's below-cost prices depended on their "tendency to eliminate rivals and create a market structure enabling the seller to recoup his losses", attempted monopolization would be a proper jury finding. App. A at 27, 668 F.2d at 1035. Inglis met that burden in the first trial: fairly viewed, the evidence showed that Continental's motive in charging below-cost prices was expressly to eliminate its rivals and to create a concentrated market structure. P-113, P-114, P-116, App. E.[8]

The court below also held that although predatory pricing required by Sherman Act § 2(a) was not always necessary to prove the competitive injury requirements of Robinson-Patman § 2(a), Inglis failed to present evidence that would otherwise fulfill that requirement. App. at A40, 668 F.2d at 1042. Contrary to the Court of Appeals' holding, however, the record contained undisputed evidence which established an adverse effect on competition: during the period that Continental charged discriminately low prices in Northern California, the number of white pan

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[8] While Continental's business plan was couched in such innocuous phrases as "hasten wholesaler exit," "attrition," and "acceleration of shake out of marginal bakers," the jury easily saw through these transparent euphemisms. The jury received substantial evidence from Continental's officials in Northern California that Continental endeavored to eliminate its competitors so as to gain more shelf space for Wonder Bread sales and that Continental actually prepared contingency plans to take full advantage of the expected "wholesaler exits" from the market. RT 310-13, 320, 1893-8, 1902-5, 1916-8, 1927-9; P-239, P-241A, P-244.

bread producers in that market fell from five to two with only the two largest, Campbell-Taggart and Continental, remaining. It would be difficult to present more persuasive evidence that competition was adversely impacted.

Inglis petitions this Court to grant certiorari to resolve a conflict among the Circuits with respect to the appropriate standard of review for orders granting a new trial on the grounds the jury verdict is against the weight of the evidence, to establish a standard that comports with the Seventh Amendment and to establish a review procedure to insure that lower courts comply with such a standard.

REASONS FOR GRANTING THE WRIT

1. There Is a Split Among the Circuit Courts of Appeal Regarding the Proper Standard of Review to be Applied Under the Seventh Amendment to Motions for a New Trial on the Grounds the Verdict Was Against the Weight of the Evidence

The Seventh Amendment to the Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law." This Court described the respective roles of judge and jury under the Seventh Amendment in *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1943):

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclu-

> sions that which it considers most reasonable. [citations omitted.] That conclusion, . . . cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (emphasis added)

See also Basham v. Pennsylvania Railroad Co., 372 U.S. 699, 700-01 (1963); *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 363-4 (1962) (error for trial and appellate courts to "reevaluate the conflicting evidence and mandate a result opposite from that reached by a jury.") In derogation of the Seventh Amendment and these well-reasoned precedents, the Ninth Circuit Court of Appeals permits and encourages its trial judges to reweigh the evidence presented to juries and to grant a motion for a new trial solely upon his or her opinion that a jury verdict was "against the weight of the evidence." *See, e.g., Inglis, supra*, 668 F.2d at 1050; *Fount-Wip, Inc. v. Redi-Whip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978); *Minthorne v. Seeburg Corp.*, 397 F.2d 237, 244 (9th Cir. 1968); *Anglo-American General v. Jackson National Life Ins. Co.*, 83 F.R.D. 41, 43 (N.D.Cal. 1979).[6]

Consistent with this Court's recognition of the jury's role under the Constitution, several Courts of Appeal have

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[6]The Circuit's disregard of juries' verdicts cannot be reconciled with its admiration for their "collective intelligence, wisdom and dedication to their tasks . . ." *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 429-31 (9th Cir. 1979) ("While we express great confidence in the abilities of judges, no one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case.")

limited the discretion of their district judges to order new trials on such flimsy grounds as the verdict being "against the weight of the evidence." This line of authority may be traced to the thoughtful *en banc* decision of the Third Circuit in *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir. 1960), *cert. den.*, 364 U.S. 835 (1961):

> "But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action affects a denigration of the jury system and to the extent the new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as a trier of facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than in a case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigant's right to a jury trial."

The stringent *Lind* approach to new trial motions is consistent with the decisions of this Court and it has been expressly adopted by the District of Columbia Circuit, First Circuit, Third Circuit, Fifth Circuit, Sixth Circuit, and Eighth Circuit.[7] The Ninth Circuit has refused to

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[7] *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 n.13 (D.C. Cir. 1969), *cert. den.*, 396 U.S. 835 and *Vander Zee v. Karabatsos*, 589 F.2d 723, 729 (D.C. Cir. 1978), *cert. den.*, 441 U.S. 910; *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978); *O'Neil*

follow the *Lind* trend and grants its district judges virtually unlimited discretion to overrule any jury verdict with which they disagree.

Inglis submits this Court should grant *certiorari* to resolve a clear split among the circuits on an elementary, but important, question of civil procedure, *i.e.*, the appropriate standard of review for a new trial motion. Inglis further submits this Court should endorse the *Lind* approach: appellate courts should be instructed to vacate new trial orders where—as here—the trial judge, in violation of the Seventh Amendment, has encroached upon the province of the jury by reassessing the credibility of the witnesses and reweighing the parties' conflicting evidence.[5] A new trial should be permitted only to prevent a "miscarriage of justice" not because the trial judge would have reached different results from that reached by the jury. *See Rios v. Empress Lines Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978); *Aalco Wrecking, supra*, 466 F.2d at 187.

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v. W.R. Grace & Co., 410 F.2d 908, 914-15 (5th Cir. 1969); *Duncan v. Duncan*, 337 F.2d 49, 52-53 (6th Cir. 1967), *cert. den.*, 389 U.S. 913; *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 185-8 (8th Cir. 1972), cert. denied, 410 U.S. 930. Other circuits have on occasion embraced an equally strict standard of review. *See, e.g., Continental Airlines, Inc. v. Wagner-Moorehouse, Inc.*, 401 F.2d 23, 30 (7th Cir. 1968); *Daiflon, Inc. v. Bohanon*, 612 F.2d 1249, 1260 (10th Cir. 1979), *rev'd on other grounds*, 449 U.S. 33 (1980).

[5]Even in those circuits where *Lind* has been adopted, the courts occasionally stray and apply the "weight of the evidence" standard of review. *See e.g., Bazile v. Bisso Marine Co.*, 606 F.2d 101, 105 (5th Cir. 1979); *Lincoln Carpet Mills v. Singer Co.*, 549 F.2d 80, 81 (8th Cir. 1977). Clearly, a uniform rule is necessary.

2. The Court of Appeals Decision Affirming the Grant of Continental's Motion for New Trial Clashes with Principles of Efficient Judicial Administration

The *Lind* standard of review for new trial motions is not only sound as a matter of Constitutional doctrine but also as a matter of practical judicial administration. If an appellate tribunal determines that no legal error was committed in the presentation of a claim and defense to a jury—*e.g.*, Inglis' Unfair Practices Act claim in this case—no useful purpose is served by presenting the same evidence and the same instructions to a second jury merely because the trial judge disagreed with the first jury's verdict. *Aalco, supra*, 466 F.2d at 187; *O'Neil, supra*, 410 F.2d at 915. See, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-9 (1971) (public policy against relitigation of same issues.) In such instances, a second, costly jury trial not only denigrates the jury system but further delays justice for other litigants on the overcrowded dockets of the district courts.

Both of the courts below clearly held that reasonable minds could draw differing conclusions from the evidence on the "meeting competition" issue and that a jury could properly find for Inglis on its state law claim. App. at A52, 668 F.2d at 1047-8; App. at C19, 461 F.Supp. at 423. Resolution of this question of fact *must be*, and *will be* made by a jury. That being so, no "miscarriage of justice" resulted from the first trial simply because the jury found Inglis' evidence more persuasive than Continental's. A second trial would be a burdensome, unnecessary, four-week repeat presentation of the same evidence to another jury

simply to obtain another verdict.[9] The law should not abide a procedural rule which allows such a needless waste of public and judicial resources and which derogates cherished Seventh Amendment rights. *See Blonder-Tongue, supra,* 402 U.S. at 328-9.

Accordingly, as the body responsible for the efficient administration of justice in a federal court system with limited resources, this Court should take this opportunity to invigorate the Seventh Amendment and instruct the lower courts that under the Amendment only one error-free trial is necessary or appropriate. The Court should announce that it considers it an abuse of discretion for district judges to negate jury verdicts which—like Inglis' verdict—are free of legal error and reasonably supported by the record; appellate courts should be encouraged to reinstate jury verdicts which are overturned on the grounds they are "against the weight of this evidence."[10]

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[9]*See Duncan, supra,* 377 F.2d at 55; *O'Neil, supra,* 410 F.2d at 915; *Aalco, supra,* 466 F.2d at 187-8; *Moore, supra,* 491 F.2d at 301.

[10]Several courts, including the Ninth Circuit, have recognized that in light of the Seventh Amendment, judges should validate a jury verdict whenever possible. *See, e.g., Atlantic & Gulf Stevedores, supra,* 369 U.S. at 364; *Gaspard v. Taylor Diving & Salvage Co.,* 649 F.2d 372, 374 (5th Cir. 1981); *Angle v. Sky Chief, Inc.,* 535 F.2d 492, 494 (9th Cir. 1976); *Guidry v. Kevy,* 598 F.2d 402, 406 (5th Cir. 1979); *Borgue v. Diamond M Drilling Co.,* 623 F.2d 351, 353 (5th Cir. 1980).

The trial judge's new trial order was overturned in *Vander Zee, supra,* 589 F.2d at 729; *Aalco, supra,* 466 F.2d at 187; *Duncan, supra,* 377 F.2d at 55; *Lind, supra,* 278 F.2d at 91; *Narcisse v. Ill. Central Gulf R. Co.,* 620 F.2d 544, 554 (5th Cir. 1980); *Spurlin v. General Motors Corp.,* 528 F.2d 612, 619-21 (5th Cir. 1976); *Moore v. Schultz,* 491 F.2d 294, 301 (10th Cir. 1974).

Such guidance by this Court is necessary to alleviate the congested dockets which plague litigants and judges alike.

3. This Court Must Occasionally Review a Trial Record to Ensure the Lower Courts Do Not Erase the Right to Trial by Jury

This case presents a needed opportunity for this Court to announce a clear rule governing the award of new trials. Unfortunately, however, the declaration of the proper standard of review may not be sufficient. The courts in the Ninth Circuit are notable for their intrusion upon the Seventh Amendment rights of citizens.[11] The trend is worsening and should be reversed by this Court. The Court should therefore apply the *Lind* standard to the trial record

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[11]See, *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1260 (9th Cir. 1981); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979); *California Computer Products v. International Business Machines*; 613 F.2d 727, 733 n.3 (9th Cir. 1979); *Marquis v. Chrysler Corp.*, 577 F.2d 624, 639 (9th Cir. 1978); *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901 (9th Cir. 1978); *Syufy Enterprises v. Nat'l General Theatres, Inc.*, 1978-1 Trade Cases ¶ 61,996 (9th Cir. 1978); *Fount-Whip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978); *Greyhound Computer v. International Bus. Mach.*, 559 F.2d 488 (9th Cir. 1977); *Santa Clara Valley Distributing v. Pabst Brewing Co.*, 556 F.2d 942 (9th Cir. 1977); *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460 (9th Cir. 1977); *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976); *Noble v. McClatchy Newspapers*, 533 F.2d 1061 (9th Cir. 1975); *Hilton v. Mumaw*, 522 F.2d 588 (9th Cir. 1975); *England v. Chrysler Corp.*, 493 F.2d 269 (9th Cir. 1974); *Hallmark Industry v. Reynolds Metal Co.*, 489 F.2d 8 (9th Cir. 1973); *Kaplan v. Burroughs Corp.*, 426 F.Supp. 1328 (N.D. Cal. 1977); *Naify v. McClatchy Newspapers*, 1977-2 Trade Cases ¶ 61,558 (N.D. Cal. 1977); *Tomac, Inc. v. Coca Cola Co.*, 418 F.Supp. 359 (C.D. Cal. 1976).

in this case and thereby demonstrate its resolve to vindicate each citizen's right to trial by jury.

If the Seventh Amendment right to jury trial is to have any significance, it must be policed by this Court to set a clear example for the lower federal courts. Litigants and the citizenry at large cherish their constitutional right to a trial by jury. Indeed, the courts extol the sanctity of this privilege. See, e.g., *U.S. Financial Securities, supra,* 609 F.2d at 429-31; *Narcisse, supra,* 620 F.2d at 546. Yet certain district judges, sitting imperiously as a "thirteenth juror," have exercised veto power over the other twelve and have transformed the "right" into an illusion. Inglis is keenly aware this Court does not welcome detailed arguments regarding conclusions which may properly be drawn from evidence presented at trial, but there is no other way to ensure the lower federal courts adhere to the Seventh Amendment.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit insofar as it affirmed the District Court's Order granting Continental a new trial on Inglis' claims under the California Unfair Practices Act, Sherman Act § 2 and Robinson-Patman Act § 2(a).

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(Appendix E follows)

Appendix E

Determining a Strategy to Combat Private Label Competition In the Bread Market

ITT-Continental Baking Company, Inc.

October 22, 1971

• • • •

IV. WILL HOLDING RETAIL PRICES IMPROVE ITT-CONTINENTAL'S COMPETITIVE POSITION?

The Federal Trade Commission has pointed out that "Since World War II, bread prices have risen three times more rapidly than the average for other food products, and bread price increases alone have accounted for nearly one-fifth of the total increase in the price index of food products consumed at home."* Since the time of that report, the price index for white bread has continued to climb rapidly (Exhibit 16). But wholesale bakers have not been the exclusive beneficiaries of these price increases. In fact, beginning about 1960, retailers started taking a growing share of the added revenues coming from retail price increases for bread (Exhibit 17). The fact that price adjustments paid by ITT-Continental to the trade increased 49 percent over the past 5 years suggests that retailers are still taking a significant share of the increased revenue from recent price increases.

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*_Economic Report on the Baking Industries_, Report of the Federal Trade Commission, November 1967.

Presuming that the readiness with which the baking industry has had recourse to price increases has helped sustain less efficient competitors in the past, it seems reasonable to assume that greater reluctance to increase retail prices in the future can significantly improve ITT-Continental's competitive position. The principal issue to be resolved under these circumstances is what will be the impact of a hold-the-price-line strategy on ITT-Continental itself and on its competitors. Specifically, the question is: To what extent is ITT-Continental and each of its competitors capable of holding prices? In answering this question, ITT-Continental must compare itself to its competitors in terms of its current financial strength and either its capability for holding or reducing costs or its willingness to absorb future cost increases by accepting lower profits.

Presuming that ITT-Continental can successfully hold the line on retail prices and also presuming that the outcome of this strategy would be an acceleration in the shakeout of marginal bakeries, ITT-Continental must also assess whether the availability of these bakeries for sale to retailers will foster the further expansion of private label. Obviously, this is not a small consideration since the private label threat is substantial now and ITT-Continental must make every effort to avoid strengthening it further.

Assuming that an aggressive price maintenance strategy passes the tests outlined above, the last issues with which management must deal have the objective of optimizing the beneficial outcome of the strategy. Certainly the first question to be answered is which tactics can be legally employed to reflect cost savings and other operating efficiencies in retail prices. A good deal of legal and government

IV. WILL HOLDING RETAIL PRICES IMPROVE ITT-CONTINENTAL'S COMPETITIVE POSITION?

	Issue	Hypothesis	Analysis/Inquiry	Sources
1.	What would be the impact on ITT-Continental and wholesale competitors of various levels of price reduction?	Lowering prices would significantly reduce profits of ITT-Continental and competitors. However, because ITT-Continental has a broad geographic base and greater financial resources it would be in a better position to weather a price war. More importantly, ITT-Continental could identify individual competitive targets and initiate price reductions on a market-by-market basis, thereby minimizing profit reduction in any one year.	Analysis of the sensitivity of ITT-Continental and competitor's profits to price reductions.	Annual reports.
			Identification of specific competitive targets, markets in which they are most vulnerable, and length of time they could sustain a price war.	Interviews with bakery and headquarters management.
2.	Has ITT-Continental benefited in the past from the exodus of competitive wholesale bakers?	ITT-Continental has benefited by attrition of wholesale bakers. However, in some cases private label has been the beneficiary as chains have purchased closed facilities.	Analysis of ITT-Continental's volume before and after closing of competitive wholesale bakeries.	Company records.
			Disposition of facilities wholesale bakers have closed.	Interviews with bakery and headquarters management.
3.	Could price-reduction strategy be followed without creating a	Government could construe pricing activities to be attempts to monopolize.	Identification of legal risks.	ITT-Continental l[illegible]al department.

consultation will clearly be necessary here to ensure that ITT-Continental's strategies are legally consistent with the government's policy of holding down inflationary price increases. If legal and other constraints permit only a national approach, the issue is then largely one of identifying pricing objectives and the cost/profit consequences of holding prices over time. If more local pricing flexibility is possible, market-by-market objectives must be evaluated and selected and action plans and coordinated programs designed to achieve those objectives.

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No. 81-2289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM INGLIS & SONS BAKING CO., *et al.*,
Cross-Petitioners

v.

ITT CONTINENTAL BAKING COMPANY,
Cross-Respondent

BRIEF OF ITT CONTINENTAL BAKING COMPANY IN RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

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July 12, 1982

QUESTIONS PRESENTED

1. Whether the court of appeals erred in granting cross-petitioners a new trial on their federal law claims notwithstanding that cross-petitioners had not moved for such relief and that the only purpose of a new trial would be to allow cross-petitioners to try to remedy their failure of proof at the first trial.

2. Whether the court of appeals properly affirmed the district court's exercise of discretion to grant cross-respondent a new trial on cross-petitioners' state law claims.

TABLE OF CONTENTS

	Page
1. Proceedings Below	2
2. This Court Should Review the *Sua Sponte* Order of the Court of Appeals for a New Trial on the Federal Law Claims	2
3. No Issue Worthy of This Court's Certiorari Jurisdiction Is Presented by Inglis' Attack on the New Trial Ordered of Its State Law Claim	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Aetna Casualty & Surety Co. v. *Yeatts*, 122 F.2d 350 (4th Cir. 1941) 7

Allied Chemical Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980) 8

Angle v. *Sky Chef, Inc.*, 535 F.2d 492 (9th Cir. 1976) 8

Cone v. *West Virginia Paper Co.*, 330 U.S. 212 (1947) 4, 6

Fairmont Glass Works v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933) 7

Globe Liquor Co. v. *San Roman*, 332 U.S. 571 (1948) 4

Grumman Aircraft Engineering Corp. v. *Renegotiation Board*, 482 F.2d 710 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975) 5

Iacurci v. *Lummus Co.*, 387 U.S. 86 (1967) 3, 4

Lemon v. *Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981) 8

Lind v. *Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960) 8

Montgomery Ward & Co. v. *Duncan*, 311 U.S. 243 (1940) 8

Neely v. *Eby Construction Co.*, 386 U.S. 317 (1967) 3, 6

Petition of Long, 295 F. Supp. 857 (S.D.N.Y. 1968), *aff'd*, 439 F.2d 109 (2d Cir. 1971) 5

TCP Industries, Inc. v. *Uniroyal, Inc.*, 661 F.2d 542 (6th Cir. 1981) 8

Traver v. *Meshriy*, 627 F.2d 934 (9th Cir. 1980) .. 8

Unijax, Inc. v. *Champion International, Inc.*, Docket No. 81-7433 (2d Cir. June 21, 1982) 6

William Inglis & Sons Baking Co. v. *ITT Continental Baking Co., Inc.*, 461 F. Supp. 410 (N.D. Cal. 1978), *aff'd in part, rev'd in part*, 668 F.2d 1014 (9th Cir. 1982) ..... *passim*

TABLE OF AUTHORITIES—Continued

Miscellaneous:	Page
Fed. R. Civ. P. 50	1, 3, 6, 7, 9
6A *Moore's Federal Practice* ¶ 59.07 (2d ed. 1982)	5, 7
11 Wright & Miller, *Federal Practice & Procedure: Civil* ¶¶ 2801, 2806 (1973)	7

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BRIEF OF ITT CONTINENTAL BAKING COMPANY IN RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

William Inglis & Sons Baking Co. ("Inglis") has cross-petitioned for review of the action of the court below remanding Inglis' state and federal law claims for a new trial. ITT Continental Baking Company ("Continental") submits that no issue warranting exercise of this Court's certiorari jurisdiction is presented by the grant of a new trial by the district court on the state law claim. However, substantial questions relating to appropriate practice under Fed. R. Civ. P. 50 are posed by the order of the court of appeals for a new trial on Inglis' federal law claims, and Continental supports the grant of certiorari for the purposes of review by this Court of those questions.

1. Proceedings Below

Inglis claimed violations of the Sherman Act and the Robinson-Patman Act. It also alleged pendent jurisdiction over a state claim under California's Cartwright Act. After a jury verdict for Inglis following a five-week trial, the district court granted judgment n.o.v. on the federal claims, and, alternatively, it granted a new trial to Continental if the court of appeals reversed the judgment n.o.v. The district court also ordered a new trial on the state claim. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.*, 461 F. Supp. 410 (N.D. Cal. 1978), App. C.[1]

All three judges of the court of appeals panel agreed with the district court that Inglis had failed to prove any violations of federal law. 668 F.2d at 1038-39, 1041, App. A32-34, A39-40. This conclusion should have led to affirmance of the judgment n.o.v. for Continental. Unaccountably, however, and in spite of the fact that Inglis had never asked for a new trial in either the district or the appellate court, the court of appeals, Judge Peck dissenting, remanded to give Inglis a second opportunity to prove its federal claims. 668 F.2d at 1038-39, 1041, 1058-59, App. A32-34, A39-40, A74-75. The court of appeals also endorsed the district court's order for a new trial of the state claims. 668 F.2d at 1050, App. A58.

2. This Court Should Review the *Sua Sponte* Order of the Court of Appeals for a New Trial on the Federal Law Claims

Inglis never asked either the district court or the court of appeals for a new trial in order to correct its failure of proof. Accordingly, the district court never has been called upon to determine whether, in the exercise

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[1] The opinions of the district court and of the court of appeals are reprinted as an Appendix to Continental's Petition for Writ of Certiorari, No. 81-2083.

of its discretion, Inglis should have a second chance to prove its case. Proper judicial procedure dictates that the party obtaining a new trial should, except perhaps in the most unusual circumstances, be required to ask for one, and that such an application should be determined by the district court subject only to review for abuse of discretion. Furthermore, both fairness to defendants, and sound judicial administration, require that plaintiffs should not have a second trial simply because they failed to prove their charges in a first trial in which they were given a full opportunity to make their case.

Federal Rule of Civil Procedure 50(c)(2) provides that a "party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after the entry of the judgment notwithstanding the verdict." Inglis did *not* file such a motion, and thus the district court never had the opportunity to pass on the new trial issue. Whatever the authority of federal courts of appeals to order a new trial *sua sponte* in special circumstances, Federal Rule 50(c)(2) clearly contemplates that the party against whom a judgment n.o.v. is entered will apply for a new trial before one is granted. *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 323-24, 327-28 (1967). Because Inglis never applied for a new trial, the parties never addressed the point, and the procedures envisioned by Rule 50(c)(2) were not followed. The result is that a new trial has been ordered so that Inglis may again try to prove its charges, even though no reasons have been stated justifying a new trial for that purpose, and even though Inglis itself, speaking on the matter for the first time in its cross-petition in this Court, has objected to the new trial order.

New trial requests ordinarily ought to be determined in the first instance by the trial courts. *Iacurci* v.

Lummus Co., 387 U.S. 86 (1967). "Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone* v. *West Virginia Paper Co.*, 330 U.S. 212, 216 (1947); *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571 (1948). Indeed, preservation of the district court's ability to decide new trial questions is the entire basis for this Court's holding that a verdict-loser must present a motion for judgment n.o.v. to the district court in order to obtain an order of judgment from the court of appeals. *Cone* v. *West Virginia Paper Co., supra.* Presentation of a motion for judgment n.o.v. permits the trial court to decide whether, in the alternative, there should be a new trial, and it also permits the verdict-winner to present to the trial court reasons why he should have a new trial or dismissal without prejudice instead of suffering an adverse judgment because of his failure of proof. *Id.* at 216-18.

This Court in *Cone* specifically rejected the argument that the appellant verdict-winner could present new trial arguments for the first time on appeal. Such a procedure "would present the question initially to the appellate court when the primary discretionary responsibility for its decision rests on the District Court." *Id.* at 218. Here, of course, the verdict-loser (Continental) did move for judgment n.o.v., thus affording Inglis the opportunity spelled out in *Cone* to ask either for a new trial or a non-suit if the motion were to be granted.

As noted, Inglis neither moved for a new trial before the district court nor asked the appeals court for a new trial as an alternative to reinstatement of its verdict. The only new trial question before the court of appeals was, therefore, the propriety of the trial court's alternative grant of a new trial to Continental. Whether Inglis should have a new trial has never been discussed by the

parties, and the court of appeals majority has not stated any reason—let alone a compelling reason that would justify its highly unusual decision—"why Inglis should be given a second opportunity" to prove its charge of predatory pricing. 668 F.2d at 1058-59, App. A74-75 (dissenting opinion).

A failure of proof, without more, is obviously not appropriate grounds for a *sua sponte* order by a court of appeals for a new trial. As Judge Peck correctly observed in his dissent: "A plaintiff's failing to present competent evidence does not warrant a new trial of the plaintiff's cause." 668 F.2d at 1058, App. A74. Inglis does not claim that its proof was erroneously limited by the trial court. It does not claim it has newly discovered evidence. It does not claim that circumstances beyond its control made it impossible to produce evidence that would have sustained its burden. It does not claim that too high a burden was placed on it. It does not claim surprise. Plainly no valid reason exists in this case to relitigate old matters. It is an abuse of defendant's rights, and wasteful of judicial resources, to let Inglis try once again to prove its charges of violation of the Sherman and Robinson-Patman Acts when all four judges below are in agreement that it failed the first time.

The standard rule has long been accepted that courts "should not grant a new trial merely because the losing party can probably present a better case on another trial . . . ." 6A *Moore's Federal Practice* ¶ 59.07 at 59-111 (2d ed. 1982); *Petition of Long*, 295 F. Supp. 857 (S.D.N.Y. 1968), *aff'd*, 439 F.2d 109 (2d Cir. 1971). This "well-established principle . . . is required for the orderly disposition of judicial business . . . ." *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 482 F.2d 710, 721 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975). The Second Circuit Court of Appeals has recently observed that, if the appellate court agrees with the district court that a plaintiff has

not proved its charge of antitrust violation, "we must affirm" the judgment n.o.v. *Unijax, Inc.* v. *Champion International, Inc.*, Docket No. 81-7433 (June 21, 1982), slip op. 3425.

Inglis is therefore correct, but for the wrong reasons, that this Court should review the new trial order on its claims of violation of federal antitrust statutes.[2] The action of the court of appeals in itself granting an unsolicited new trial in order that Inglis may improve its proof is inconsistent with the practice contemplated in *Neely*, *Cone*, Rule 50(c)(2), and other authorities. The court of appeals has usurped the preeminent role of the district court in new trial determinations. It has ordered a new trial for no stated reasons and for a purpose that is clearly improper. This Court's careful elucidation in *Neely* of proper appellate practice in Rule 50 situations did not anticipate the bizarre holding in this case. The

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[2] Inglis' reasons for review by this Court of the new trial order for its federal claims are without merit. As discussed below, it is clear that the Seventh Amendment is not violated when trial courts review the evidence to determine whether, in their discretion, a new trial should be ordered. Nor is there any split within the circuits as to the standard of review of these discretionary decisions.

Moreover, as the trial court's opinion shows, there were numerous grounds for ordering a new trial for Continental. The verdict was plainly excessive since it exceeded by some three million dollars plaintiff's maximum permissible claim. 461 F. Supp. at 423-25, App. C19-22. The jury's rejection of the meeting competition defense was clearly against the weight of the evidence. 461 F. Supp. at 423, App. C18-19; 668 F.2d at 1044-48, 1050, App. A46-52, A57-58. The McKinsey report on which Inglis relied so heavily in the trial court, and relies on here, never should have been admitted; both courts below have now concluded that McKinsey was not a co-conspirator and that none of Continental's prices were affected by anything in the report. 668 F.2d at 1038-39, 1055-56, App. A33-34, A69-70; 461 F. Supp. at 422 n.11, App. C16 n.11. Finally, Inglis' reliance on a "wooden reading of a footnote" (668 F.2d at 1058, App. A75 (Peck, J., dissenting)) in a prior opinion to show that Continental's marginal costs were 93 percent of total cost was not probative of the costs that are relevant to measuring whether prices are predatory. 461 F. Supp. at 418-19, App. C7-8, C11; 668 F.2d at 1036-38, App. A29-32.

Court should accept this Rule 50(c)(2) question and make clear the proper procedures to be followed especially where, as here, every judge who has reviewed the matter has held that plaintiff failed to prove a sufficient case to get to a jury.

3. No Issue Worthy of This Court's Certiorari Jurisdiction Is Presented by Inglis' Attack on the New Trial Ordered of Its State Law Claim

Inglis also attempts to persuade this Court to exercise its certiorari jurisdiction to review the unanimous judgment below that the trial judge did not abuse his discretion in awarding Continental a new trial on Inglis' pendent state law claim. This contention is utterly without merit, and clearly not one for ceriorari. It was almost fifty years ago that this Court observed that "a long and unbroken line of decisions" had by then established that the Court "will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact . . . ." *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933).

Inglis argues that the Seventh Amendment bars trial judges from reviewing the evidence and ordering a new trial where, as here, they conclude that the jury reached "a totally erroneous result." 461 F. Supp. at 423, App. C19. At common law judges were granting new trials on failure of proof grounds at least as early as 1665.[8] Common law practice in this regard is of course incorporated into the Seventh Amendment by its terms. This Court has noted the common law origins of the motion for new trial, and has recognized that district courts have authority to set aside verdicts that are unsupported

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[8] Judge Parker's opinion in Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941), includes an often-cited review of some of the common law precedents. *See also* 11 Wright & Miller, *Federal Practice and Procedure: Civil* ¶¶ 2801, 2806 (1973); 6A *Moore's Federal Practice* ¶ 59.08[5] (2d ed. 1982).

by evidence or against the weight of the evidence. *E.g.*, *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 250-51 (1940).

Both courts below were fully aware of the grounds upon which new trials may be, and should be, granted. 461 F. Supp. at 415-16, App. C3; 668 F.2d at 1027, App. A8. This Court has noted that new trial grants are "confided almost entirely to the exercise of discretion" of the district courts. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980). The test on appeal, recognized by all courts of appeals, is whether there has been an abuse of that discretion. *TCP Industries, Inc.* v. *Uniroyal, Inc.*, 661 F.2d 542, 546 (6th Cir. 1981); *Lemon* v. *Bank Lines, Ltd.*, 656 F.2d 110, 116 (5th Cir. 1981). Inglis does not establish a split within the circuits simply by quoting dictum from a Third Circuit case in which a new trial grant was reversed. *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir.), *cert. denied*, 364 835 (1960). As the *Lind* opinion itself acknowledged, a district court's discretionary ruling on a new trial motion will be reversed only where "an appellate court is shown special or unusual circumstances which clearly indicate an abuse of discretion . . . ." 278 F.2d at 88. This is not different in substance from the statements of the test by the Ninth Circuit in this case and in others. 668 F.2d at 1027, App. A8; *Traver* v. *Meshriy*, 627 F.2d 934, 940-41 (9th Cir. 1980); *Angle* v. *Sky Chef, Inc.*, 535 F.2d 492, 494 (9th Cir. 1976). Clearly Inglis has shown nothing even approaching these standards.

CONCLUSION

Obviously no question calling for this Court's review is presented by the unanimous conclusion of the four judges below that Continental should have a new trial on the state claim. Whether, however, the court of appeals should have, *sua sponte*, ordered a new trial in favor of Inglis on its federal claims to correct a failure of proof presents important issues relating to the administration of Rules 50(c) and the related Rule 50(d) that should be resolved by this Court. Accordingly, the cross-petition should be granted limited to this question.

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